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Joint UNCTAD/IMO Intergovernmental Group
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Ninth session
Geneva, 2 December 1996
Item 3 of the provisional agenda

CONSIDERATION OF THE REVIEW OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO THE ARREST OF SEA-GOING SHIPS, 1952

Note by the secretariat of UNCTAD

Compilation of comments and proposals by Governments, on the draft articles for a convention on arrest of ships */

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INTRODUCTION

1. This document sets out the comments and proposals of Governments on the draft articles for a convention on arrest of ships that were received as of Thursday, 22 August 1996. Up to that date comments had been received from the following:

Governments: Japan; United Kingdom of Great Britain and Northern Ireland.

COMPILATION OF COMMENTS AND PROPOSALS

JAPAN

Article 1, para 2:

2. Add the following phrase at the end of paragraph 2: "or other documents which are enforceable under the law of the State where such measures have been taken".

3. So, para 2, amended by the above addition, will read as follows:

> *"Arrest" means the detention of a ship by judicial process to secure maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement or other documents which are enforceable under the law of the State where such measures have been taken.*

3. Reason for the above amendment: We believe that this Convention aims at restriction of the detention of a ship as provisional measures prior to obtaining enforceable judgement. Its article 4, which regulates release from arrest by sufficient security, and the article 7, which sets forth a tribunal to determine the merits of the case, can be understood only in that context. Therefore, the seizure of a ship based on the documents which are enforceable in the same way as judgements under the law of the State should be excluded from the definition of "Arrest". In Japan, such documents include:

- conciliation protocol;
- officially authenticated instruments which are agreements of the parties, written before a judge or a notary public;
- copy of register that certifies the right of hypothecation, and so forth.

Article 3:

4. According to the Law of Civil Provisional Remedies of Japan, provisional detention measures against a ship can be granted if the ship, regardless of whether the claim arose in respect of that ship or not, is owned by the debtor at the time when the detention measure is effected. From this standpoint, with respect to paragraph 1(d)(i) and paragraph 2, it is not

necessary to require that the debtor who owns the ship at the time of arrest also possess or charter the ship when the claim arose.

Article 4:

5. Article 4, which concerns mandatory release from arrest by security, should not apply to the arrest relating to the disputes as to ownership or possession of the ship, because such disputes can not be always solved by pecuniary compensation. In this connection, paragraph 1 of article 5 of 1952 Arrest Convention clearly excludes the arrests in respect of such disputes from the application of release by security. Therefore, we propose that paragraph 1 of Article 4 of the revised draft should be reverted to the text of 1952 Arrest Convention.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Introduction

6. At the close of the eighth session of the Joint Intergovernmental Group of Experts (JIGE) the Chairman urged delegations wishing to propose amendments to the draft articles to submit written proposals, in order that these might be considered at the group's ninth session (document JIGE(VIII)/7, Annex I, paragraph 67). This submission sets out the UK delegation's comments on, and proposals for amendments to, the draft articles contained in document JIGE(VIII)/2 (the "JIGE text").

Article 1(2)

7. Following the discussion on this provision at the eighth session of the JIGE, it was concluded that the definition of "arrest" in the JIGE text should be identical to that in the 1952 Convention (document JIGE(VIII)/7, Annex I, paragraph 27).

8. The United Kingdom delegation entirely agrees that the JIGE definition should be modelled more closely on that of the 1952 Convention and, in particular, that the phrase "when at the time of such detention or restriction the ship is physically within the jurisdiction of the State where the order has been made" in the first sentence of the JIGE text should be deleted. There is no equivalent of this phrase in the 1952 Convention. Its inclusion would add unnecessary ambiguity to the definition. Article 2(1) of the JIGE text contains rules on which courts are able to order the arrest of a ship. Article 7 contains rules on which courts have jurisdiction to consider the case upon its merits.

9. Discussions are under-way in the United Kingdom on whether it would be desirable for the Mareva injunction to be covered by the definition of "arrest".

Article 1(3)

10. There is a clear definition of "person" in Article I(2) of the 1969 Civil Liability Convention. The 1992 Protocol did not change the

definition.The same definition has now also been adopted in Article 1(2) of the 1996 HNS Convention. The United Kingdom delegation therefore proposes that the JIGE should not adopt a revised wording for the sake of it but should adopt this tried and tested definition:

> *"Person" means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.*

11. The United Kingdom delegation submits that the intended meaning of the definition contained in Article 1(3) of the JIGE text is the same as that of the CLC precedent. However, while the meaning of the JIGE text has been queried, that of the text used in CLC is well understood.

Article 2(1)

12. The United Kingdom delegation believes that the reference, in Article 2(1) of the JIGE text, to the State in which the arrest is *demanded* is unnecessary and misleading. The provision should, as in Article 4 of the 1952 Convention, refer only to the State in which the arrest is made:

> *A ship may be arrested or released from arrest only by or under the authority of a Court of the State in which the arrest is made.*

Article 2(4)

13. The United Kingdom delegation agrees that it is helpful to clarify that a ship may be arrested for the purpose of obtaining security under the authority of a court other than that with jurisdiction to examine the case on its merits. As currently drafted, however, Article 2(4) of the JIGE text suggests that an arrest in such circumstances is only possible in two specific cases: namely, where there is a jurisdiction clause or arbitration clause in any relevant contract.

14. There are other circumstances which could result in the merits of the case being considered by a court or arbitrator in a State other than that in which the arrest was made. For example, the Brussels Convention on Jurisdiction and the Enforcement of Judgements may prevent the court under the authority of which the ship has been arrested from assuming jurisdiction over the merits (*The Tatry*); the application of the doctrine of *forum non conveniens* or rules on *lis alibi pendens* may also prevent the court under the authority of which the ship has been arrested from exercising jurisdiction over the merits. It is therefore necessary to amend Article 2(4) so as to separate more clearly the ability of a court: (a) to hear a claim on the merits, and (b) to award provisional security by way of arrest.

15. The UK delegation proposes that clarification be added to Article 2(4) of the JIGE text by amending the provision as follows:

A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is made is to be adjudicated in a State other than the State where the arrest is made, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

Article 2(5)

16. As in Article 2(1) (see paragraph 12), the United Kingdom delegation believes that the reference to the State in which the arrest is *demanded* is unnecessary and misleading. The provision should instead, as in Article 6 of the 1952 Convention, refer to the State in which the arrest is made:

Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest is made.

Article 3(1)

17. While there are differing interpretations of Article 3(1) of the 1952 Convention, it can be argued that that Convention provides an unfettered right for a claimant to arrest the particular ship in respect of which a maritime claim arose, irrespective of whether the claim is secured by a maritime lien or whether the shipowner is personally liable for the claim. It is generally agreed, however, that - even if the 1952 Convention does not provide such an unfettered right - there is nothing in the Convention to prevent a State from providing such a right under national law.

18. The United Kingdom delegation is not convinced that there is any need to depart from the general approach of the 1952 Convention, particularly if it is agreed that the list of maritime claims in Article 1(1) should be exhaustive. However, if there is to be a link between the right to arrest a ship and the existence of a maritime lien, the drafting of Article 3(1) could be made considerably simpler by referring only to maritime liens recognized by the law of the State in which the arrest was made.

19. The United Kingdom delegation also proposes that the reference to mortgages, "hypothèques" and registrable charges of a similar nature in Article 3(1)(b) should follow the wording used in the chapeau, and subparagraph (u), of Article 1(1).

20. In order to implement the two changes proposed above, Article 3(1) of the JIGE text should be amended as follows:

Arrest is permissible of any ship in respect of which a maritime claim is asserted if:

(a) the claim is secured by a maritime lien recognized under the law of the State where the arrest is made;

(b) the claim is based upon a mortgage, an "hypothèque" or registrable charge of a similar nature;

(c) [...]; or

(d) [...].

Article 4(2)

21. Unlike Article 5 of the 1952 Convention, Article 4(2) of the JIGE text provides that the amount of security should not exceed the value of the ship. Article 8(6) of the JIGE text, however, provides that international conventions on limitation of liability would take precedence over the new Arrest Convention.

22. The reference to the value of the ship in Article 4(2) is confusing, therefore, since the applicable limitation amount will very often exceed the value of the ship. The recent entry into force of the 1992 Protocol to the 1969 Civil Liability Convention and the adoption of the HNS Convention and the 1996 Protocol to the Convention on the Limitation of Liability for Maritime Claims 1976 make this even more likely than in the past.

23. The United Kingdom delegation believes that it is poor drafting to suggest, in Article 4(2), that the amount of security is restricted to the value of the ship when, by virtue of Article 8(6), the relevant restriction in most cases will be the applicable limit on the shipowner's liability, which will generally be a greater amount. Article 4(2) should therefore provide, as Article 5 of the 1952 Convention does, that:

> *In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof.*

24. Consequential amendments will be needed to Articles 4(4)(b) and 5(1)(a).

Article 6

25. The United Kingdom delegation is not convinced that there is any valid reason to change the simple provision contained in Article 6 of the 1952 Convention. If, however, the majority view is that the additional detail contained in Article 6 of the JIGE text *is* desirable, the United Kingdom delegation would suggest that the references to "unjustified" arrest should be deleted from paragraphs 1(a) and 2(a).

26. Without the deletion of the references to "unjustified" arrest, the provision might conflict with United Kingdom law, which is based on the premise that, with the exception of wrongful arrest, a claimant should not be penalised for having arrested a ship, even if the action fails on the merits. The concept of an "unjustified" arrest is also ambiguous: an arrest might be perfectly justified based on the facts available to the claimant at the time the arrest is demanded, but could turn out not to be justified when the true facts of the case become clear. Paragraphs 1(a) and 2(b) should therefore be amended to refer only to:

the arrest having been wrongful.